

November 13, 2014

Federal Election Commission
Mr. Adav Noti, Acting Associate General Counsel for Policy
999 E Street, NW
Washington, DC 10463

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OFFICE OF GENERAL
COUNSEL

Re: Advisory Opinion Request

Dear Mr. Noti:

Pursuant to 52 USC § 30108 and 11 CFR § 112.6, ActBlue requests an advisory opinion concerning the activities outlined below related to establishing and accepting contributions made to certain nominee and draft funds for potential presidential candidates.

I. Factual Background

ActBlue is registered with the Commission as a non-connected federal committee and works to increase grassroots participation in the financing of political campaigns. ActBlue operates and maintains the website www.actblue.com, which provides Internet-based tools for Democratic candidates and committees to solicit and process contributions. ActBlue acts as an intermediary, within the meaning of 52 USC § 30116(a)(8), for individual contributions made on the website to Democratic candidates and committees.

Among the tools ActBlue provides is the ability to make contributions to funds designated for certain potential candidates and eventual party nominees. ActBlue complies with all of the requirements related to such draft and nominee funds that have been laid out in prior Commission advisory opinions provided to WE LEAD and to ActBlue. Principal among these requirements are complying with the Commission's source prohibitions and amount limitations, clearly disclosing to whom an individual's contribution will be forwarded under what circumstances, timely forwarding of those contributions, and properly reporting the contributions to the Commission. All of the draft and nominee funds administered by ActBlue, including those contemplated in this request, will continue to comply with these requirements.

The newly devised funds that are the subject of this request are designed to cater to the public's strong desire to see a woman run for president on the Democratic ticket in 2016. The story of Hillary Clinton's 2008 Presidential run is well-known: she was the first female candidate to participate in the presidential primary or caucus in every single state, and she made history as the most successful female candidate for the presidential nomination of a major political party. Her campaign galvanized voters around the prospect of electing the first woman president so much that even before the 2014 election cycle had finished, supporters of Clinton and other prominent political women like Senator Elizabeth Warren formed committees to encourage these and other women to make a run for the presidency. Electing the first woman president is an

endeavor that remains ongoing for many Americans, and in particular, for many of ActBlue's users.

In response to this interest, ActBlue would like to offer its users the ability to organize around and fundraise for a potential female presidential candidate. Traditional draft funds — which have been formed for potential presidential candidates for many cycles now — will likely be added to the website for specific potential female candidates. But ActBlue envisions a few modifications to the traditional draft and nominee funds that it would also like to offer.

The first such modification would be made to a traditional nominee fund, whereby contributions earmarked for the eventual nominee of the Democratic Party for the office of president in the 2016 election cycle will be accepted, held, and eventually forwarded once the nominee is identified. For those supporters who specifically would like the nominee to be a woman, the additional criterion of the nominee's gender would be added. Should the eventual nominee of the Democratic Party turn out to be a woman, the funds would be forwarded to the nominee's authorized committee. Otherwise, the funds would be diverted to a default recipient, such as the Democratic National Committee, which would be disclosed to the contributors at the time the contributions were made.

The second modification would be made to a traditional draft fund, whereby an individual potential candidate is identified by name, and the funds are forwarded to the candidate if and when she forms an authorized presidential campaign committee. Unlike other draft funds, however, which tend to establish the seventh day before the presidential nominating convention as the deadline for the potential candidate to form a committee, a different date will be selected in advance as the deadline, and it will be clearly disclosed to contributors at the time of making a contribution. By choosing an earlier deadline, supporters can convey their strong support for the potential candidate to mount a campaign, but indicate that they intend to shift their support to a different candidate should their chosen candidate fail to enter the race in a timely manner. The time pressure could increase the incentive for the potential candidate to enter the race. This will also prevent the sequestering of funds in the draft fund until the nominating convention, well past the point of usefulness for the default recipient during the primary season to, for instance, support another candidate who has already chosen to enter the race.

The final modification ActBlue would like to offer builds off of the second. A traditional draft fund for a specific potential female candidate, with a deadline date before the nominating convention, would be established. As with all such funds, a default recipient would be selected, and the funds would go to that committee in the event that the potential candidate does not establish a committee by the deadline. However, the default recipient would be another potential female candidate for president, and a deadline — either the same as or later than the first — would be chosen for that recipient to establish an authorized presidential campaign committee. A series of such default recipients might potentially be established, but the final default recipient in the chain will always be a committee already in existence, such as the Democratic National Committee, which is certain to still be active on the last deadline date. In this way, rather than establishing separate draft funds for each potential candidate with the increased risk that one or more of the candidates will not enter the race, those who support electing a Democratic female president could establish a single draft fund and choose, in order of preference, which candidates

they would like to support in the hopes that at least one of them will enter the race and receive all of the funds contributed.

II. Questions Presented

In order to determine whether the contemplated modifications to traditional draft and nominee funds are permissible under the Federal Election Campaign Act, ActBlue asks the following three questions regarding the ways in which individual donors may earmark contributions to a presumptive nominee or a specific potential candidate:

1. May ActBlue establish a traditional nominee fund with the additional criterion that the nominee of the Democratic Party for president in 2016 must be a woman in order to receive the contributions?
2. May ActBlue establish a traditional draft fund where the date by which the potential candidate must establish an authorized campaign committee is selected in advance, but is unrelated to the date on which the Democratic National Convention begins?
3. May ActBlue establish a traditional nominee fund that includes a series of default recipients, each with a deadline to establish an authorized campaign committee that is either the same as or later than the deadline for the previous recipient, such that if the first specifically named person does not do so by the deadline, then the earmarked contributions will go to the next specifically named person, unless that person does not establish a committee by her deadline, and so on?

ActBlue proposes to establish these funds and allow users to begin soliciting contributions to them as soon as possible, contingent upon receiving an affirmative response to this request.

III. Legal Discussion

The Commission has previously approved draft and nominee funds in instances where the recipient of the contributions can be clearly identified by certain factors. The Commission also expressed concern in these rulings that the committee that receives the earmarked contributions as an intermediary not exercise direction or control over the earmarked contributions in excess of its contribution limits. ActBlue believes that the additional factors introduced in this request are in accordance with these prior rulings and do not compel a different outcome.

The Commission's regulations permit an earmarked contribution to be made to a "clearly identified candidate or a candidate's authorized committee." 11 CFR § 110.6(b)(1). The Commission has interpreted this regulation to allow contributions to be earmarked for an undetermined Federal candidate in certain circumstances. See AO 2003-23 (WE LEAD), AO 2006-30 (ActBlue), AO 1982-23 (Westchester Citizens for Good Government), AO 1977-16 (Iowa 1980 U.S. Senate Campaign Committee). In prior rulings, the Commission approved contributions to a potential candidate because the candidates were identifiable by specific office sought, party affiliation, and election cycle. Although the name of an eventual nominee was not

known at the time of making a contribution, or it was not known whether a favored presidential contender would ultimately form a campaign committee, these unknowns could be resolved with certainty at some point in time.

1. Nominee Fund with the Additional Criterion of Gender

The questions presented here do not differ materially from those presented in Advisory Opinion 2003-23 (WE LEAD) and Advisory Opinion 2006-30 (ActBlue). In those requests, both WE LEAD and ActBlue described a clear method by which to identify the presumptive nominee or the status of a potential candidate. Here, ActBlue proposes to comply with the same procedures. In the case of a nominee fund based on the gender of the eventual nominee, the nominee remains identifiable on precisely the same basis — office sought, party affiliation, and election cycle. The additional question of whether the nominee is or is not a woman does not alter ActBlue's ability to identify the candidate for whom the contribution was earmarked.¹

Nor would the addition of the question of gender to the traditional nominee fund result in the exercise of direction or control by ActBlue. An earmarked contribution is considered to be a contribution from the original contributor *and the intermediary or conduit* in the event that the intermediary exercises direction or control over the contribution, and any such contributions must not exceed the intermediary's contribution limit to the recipient committee. *See* 52 USC § 30116; 11 CFR § 110.6(a). The Commission has characterized "direction or control" as deciding whether or not a contribution is made, in what amount, and to whom that contribution is made. *See* AO 1980-46 (National Conservative PAC). In this case, the contributor will have chosen to make a contribution and in what amount, and will have provided clear and unambiguous direction as to whether to make the contribution to the nominee or instead to the default recipient. For this reason, and because the ultimate recipient of the contribution would be determined by factors outside of ActBlue's control, the contribution remains that of the original contributor only.

2. Draft Fund with a Different Deadline

Likewise, a draft fund with a different deadline for determining whether the potential candidate will receive the funds is consistent with the procedures set out in prior opinions. Typically, committees that establish presidential draft funds have chosen the seventh day before the nominating convention as the deadline. However, this is merely an artifact of the original request presented to the Commission. *See* AO 2003-23 (WE LEAD), *see also* AO 2006-30 (ActBlue). There was no discussion in that opinion regarding why this date was chosen nor the legal implications of choosing this or any other date. Approval of a presidential draft fund has never been made contingent in any way upon the use of this date as a deadline. As long as the deadline is chosen in advance, is clearly disclosed to the contributor at the time of making a contribution, and is not subject to change, any chosen date within the pertinent election cycle (prior to the nominating convention, when uncertainty about the potential candidate's status as a

¹ A person's gender identity is not always apparent. Recently, transgender candidates have run successful campaigns at the state-level, including for instance, Lauren Scott in Nevada. ActBlue looks forward to the day when a transgender candidate mounts a viable presidential campaign, but for purposes of this opinion, we respectfully request that the Commission treat gender as though it is easily determined.

presidential candidate for the party is resolved) is still consistent with the Commission's prior determinations.

Although the contributor herself does not determine the date upon which her contribution will be forwarded, to either the chosen candidate or the default recipient, consistency with Commission precedent would suggest this does not implicate the "direction or control" standard. The Commission has previously concluded that when an intermediary suggests contributing to a particular recipient or contributing a particular amount, it is merely a suggestion and does not constitute exercising direction or control because the contributor retains the ability to decide whether or not to contribute and how much. *See* AO 2013-14 (ActBlue) at pp. 3-4. The same can surely be said for suggesting the date of a contribution. And the contributor to the draft fund still has complete control over whether to contribute and how much. Therefore, setting in advance the date on which a contribution to a draft candidate will go either to the candidate or to the default recipient does not constitute direction or control.

3. Draft Fund with Multiple Default Recipients

A draft fund which has not one but a series of default recipients is an issue of first impression for the Commission, but the legal justification for this arrangement is merely an application of the same principles in repetition. The Commission has approved a draft fund with a single default recipient. *See* AO 2003-23 (WE LEAD). As outlined above, the deadline set for the potential candidate to establish a campaign committee before the draft fund defaults may be selected without any ramifications as to the legality of the draft fund. Since contributions may be earmarked to one undetermined candidate who must establish a committee by a certain deadline, there is nothing in the law or the Commission's regulations which prevents applying the same arrangement to the default recipient of the fund, and the default recipient after that, and so on. Each of the potential candidates selected as successive default recipients can be identified as to party affiliation, office sought, and election cycle, and the intermediary exercises no direction or control over the contributions earmarked for those potential candidates. So long as it is certain that there will ultimately be a disposition of the earmarked contributions — by, for instance, selecting as the final default recipient a committee which is certain to be in existence at the time of the final deadline, such as a national party committee — nothing prohibits the establishment of a draft fund with multiple successive default recipients.

IV. Conclusion

The Commission has previously determined that a contribution may be earmarked to an undetermined candidate as long as that person is identifiable as to specific office sought, party affiliation, and election cycle. Because the addition of the candidate's gender as a condition for making a contribution does not affect the identification of such a candidate, ActBlue should be permitted to establish a nominee fund for the Democratic candidate for president in 2016 with the condition that the funds will go to the default recipient if the nominee is not a woman. The date by which an undetermined candidate must establish a campaign committee in order to receive draft funds has no bearing on whether the fund complies with the law, and therefore ActBlue may select any date within the election cycle as the deadline for a draft fund. Finally, because a default recipient may be selected for a draft fund, and there is no prohibition on

selecting a series of undetermined candidates as default recipients for a draft fund, ActBlue should be permitted to establish a presidential draft fund with such a series of default recipients

For the reasons set forth above, ActBlue respectfully requests that the Commission issue an advisory opinion responding affirmatively to each of ActBlue's three questions relating to nominee and draft funds for potential candidates. Thank you very much for your consideration. Should you require any further information, please do not hesitate to reach me by phone at 617-299-8846 or by email at Flores@actblue.com. We look forward to your response.

Sincerely,



Melissa Flores
In-House Counsel

Steven Gold
General Counsel



Re: Advisory Opinion Request
Melissa Flores to: JWaldstreicher, arothstein
Cc: Steve Gold, abell

12/03/2014 10:35 AM

Hi Joanna,

Thanks for following up. Yes, your summary accurately reflects the scenario we've presented. Please let me know if there's any additional information I can provide.

Best,
Melissa

On Wed, Dec 3, 2014 at 9:17 AM, <JWaldstreicher@fec.gov> wrote:

Dear Ms. Flores and Mr. Gold:

Thank you for speaking with us about your advisory opinion request on Monday. We have set out below our understanding of some of the information that you provided in that conversation. Please confirm the accuracy of these statements or correct them if they are not accurate as written.

ActBlue will establish draft funds at the request of groups or individuals that want to use the funds to encourage specific individuals to run for office. ActBlue will evaluate each request to determine whether there is likely to be sufficient support for such a draft fund. ActBlue will limit the number of draft funds for each potential candidate to minimize confusion among contributors and for ease of administration. ActBlue will work with each group or individual that asks to establish a draft fund to set the deadline by which the potential candidate must form a campaign committee.

Any group or individual wishing to establish a draft fund for multiple potential candidates will determine who the potential candidates are, the order in which the potential candidates will be eligible to receive contributions (that is, the primary and series of default candidates), and the deadlines by which they must form campaign committees. Contributors will choose whether to contribute to the draft fund as established; contributors will not be able to change the order of primary or default candidates or the deadlines by which potential candidates must establish campaign committees.

We would appreciate your response by email. Your response may be considered part of your advisory opinion request; if so, it will be posted as such on the Commission's website.

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